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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 594, MISC.

GERARD E. NISTAL,

Petitioner,

vs.

KARL F. HAUSAUER, Commanding General of the New York National Guard,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This brief is submitted in opposition to petitioner's prayer for a writ of certiorari to review an order of the New York Court of Appeals (308 N. Y. 146) which dismissed a proceeding wherein petitioner, who had made application for discharge from the New York Air National Guard prior to the expiration of his term of enlistment, sought review of a discharge "not honorable" issued to him "By Command of the Governor" and a direction that he be given an honorable discharge.

Applicable State Law

The opinion written by the New York Court of Appeals construes the pertinent provisions of the State Constitution, statutes and military regulations. Our summary will be brief.

Under New York law, the Governor, in his constitutional and statutory capacity of commander-in-chief of the New York Air National Guard, has the power to grant applications made by enlisted men for discharge prior to the expiration of their enlistment terms.

The determination as to the propriety of shortening the term of enlistment and the characterization of the discharge is left to the executive discretion of the Governor.* As the Court of Appeals pointed out (pp. 151-152), "* * * there is no statute requiring or authorizing a trial or any particular kind of hearing in such cases."

Although there is no constitutional or statutory restriction on the manner in which the Governor is to exercise his executive discretion, the procedure adopted within military channels calls for the submission of the enlisted man's application to an advisory board which is "set up

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* The state military regulations, promulgated by the Governor under statutory authority, provide that discharges may be either (a) honorable, (b) dishonorable or (c) neither honorable nor dishonorable, termed either "not honorable" or "without honor." Dishonorable discharges are considered as punishment for wrongdoing and cannot be imposed except after a court-martial. A discharge "not honorable" or "without honor" means only that the man is being discharged without the kind of commendation involved in an honorable discharge, and, under the regulations, may be issued where there is fraudulent enlistment. Aside from the restriction pertaining to a dishonorable discharge, the Court of Appeals noted (p. 151) that "the kind of discharge to be given an enlisted man is not controlled by statute and 'must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge' (*Reid* v. *United States*, 161 F. 469, 472, appeal dismissed 211 U. S. 529 * * *)."

for the purpose of making *recommendations*" to the Governor (p. 151; emphasis supplied). The Governor may act regardless of the recommendation (p. 153).

The military memorandum prescribing the procedure to be followed by the board provides that "in all cases possible [it] will interview the enlisted man" and "if discharge is recommended, will state whether discharge should be Honorable or under conditions other than Honorable."

The Facts

Nistal was an enlisted man in the New York Air National Guard. He applied for a discharge prior to the expiration of his enlistment term. In accordance with the procedure which we have discussed, his application was first reviewed by the advisory board.

Nistal was called before the board. He was advised that he was charged with fraudulent enlistment in that he had falsely answered questions on the enlistment application dealing with prior convictions. He was permitted to state his explanation.

The board recommended that his application for discharge be granted, without honor. Thereafter, a Special Order, signed by the respondent as Chief of Staff, and expressly stated to be "By Command of the Governor," directed that he be discharged "(not honorable) * * * for fraudulent enlistment" (R. 62-63).

Nistal instituted a proceeding in the New York Supreme Court, New York County, to compel the issuance of an honorable discharge. The sum and substance of his position was, even as he describes it in his present petition to this Court (p. 9), that he was deprived of "due process of law in that he never received a fair trial of the charges against him."

Dismissal of the Proceeding

In an exhaustive opinion, the Court of Appeals reviewed the facts and the applicable state law (*supra*, pp. 2-3) and concluded that the granting and characterization of the discharge was an act performed in the executive discretion of the Governor, without any statutory requirement or authorization for a trial or any particular kind of hearing, and was not subject to review by the judiciary. Having so found, the Court went on to say (pp. 153-154):

> "It is unnecessary to pass upon (neither court below did) respondent's further defense that this proceeding must be dismissed as late, having been commenced after expiration of the four months' time limitation of article 78 of the Civil Practice Act. Pertinent dates are: December 18, 1950, board met, interviewed petitioner, and considered his application for discharge; December 28, 1950, order for petitioner's discharge 'not honorable' issued, and notice thereof given to petitioner; January 5, 1951, petitioner acknowledged receipt of order and asked for review thereof; January 25, 1951, petitioner was notified that proceedings had been reviewed and there could be no further hearing; February 8, 1952, petitioner brought an article 78 proceeding (not this one) which was discontinued; May 20, 1952, petitioner called for and received his discharge paper, dated December 29, 1950; June 5, 1952, petitioner commenced the present proceeding. Thus, although the actual written certificate of discharge was not received until about fifteen days before this proceeding was commenced, the determination which he is seeking to review had been made, and notice given him thereof, more than a year before the commencement of this proceeding."

ARGUMENT

POINT I

No federal question is presented. In any event, this cause presents no issue warranting review by this Court.

It is quite plain from the language which we have quoted from the Court of Appeals' opinion (*supra*, p. 4) that this proceeding could actually have been dismissed upon the single ground that it was not commenced within the four months' time limitation prescribed by article 78 of the New York Civil Practice Act (sect. 1286). While this in itself would seem to preclude the granting of the writ (*Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54), we shall also demonstrate that this case does not present any federal question and, in any event, that there is no issue which warrants review by this Court.

A.

"The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the State courts" (*Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U. S. 495, 499-500).

The New York Court of Appeals has construed the state Constitution, statutes and military regulations and concluded that under state law the granting of a discharge to an enlisted man prior to the expiration of his enlistment term, and the characterization of the discharge, are functions which lie within the executive discretion of the Governor in his constitutional and statutory capacity as commander-in-chief of the state forces. It is familiar doc-

trine that the Chief Executive's exercise of discretion within the orbit of his constitutional and statutory executive power is not subject to judicial review. *Reaves* v. *Ainsworth*, 219 U. S. 296, 306; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184; *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371; *Orloff* v. *Willoughby*, 345 U. S. 83, 90, 97; *Reid* v. *United States*, 161 F. 469, app. dism. 211 U. S. 529, *supra*; *People ex rel. Broderick* v. *Morton*, 156 N. Y. 136; *People ex rel. Smith* v. *Hoffman*, 166 N. Y. 462; *Matter of Donnelly* v. *Roosevelt*, 144 Misc. (N. Y.) 525, 531-532 and cases there cited.

The act which petitioner is seeking to review is one made by the Governor in the exercise of his executive discretion in a field in which he had undoubted power and jurisdiction, and is immune from judicial interference. Nor may the judiciary direct the Governor to issue an honorable discharge.

B.

The substance of petitioner's contention, to quote from page 9 of his petition to this Court, is that the discharge without honor "deprived him of his property rights, good name, and reputation, without due process of law in that he never received a fair trial of the charges against him." This presupposes that the Constitution or the statutes or the military regulations of the state prescribe or authorize a trial as a pre-requisite to the Governor's exercise of discretion. But the Court of Appeals has found state law to be to the contrary. The procedure adopted within military channels is simply to afford the applicant an "interview" before a board which makes a *recommendation* and which the Governor may follow or disregard in whole or in part.

Reaves v. *Ainsworth*, 219 U. S. 296, *supra*, is strikingly analogous and, in itself, justifies denial of the writ. By

act of Congress, the President was authorized to prescribe a system of examination for promotion and discharge of officers below the rank of major. A board of examination was established and its report was made to the President, in whose discretion lay the final decision. After report by the board, Reaves was discharged by an order signed by the Acting Chief of Staff "By direction of the President" (p. 303).

Reaves applied for a writ of certiorari to review the proceedings of the board and to annul the order of discharge. He attacked the board action as "illegal and arbitrary" (p. 301) and urged that he "was not allowed to call witnesses, nor to inspect exhibits presented to the board, nor to cross-examine the surgeons on their report" and that all "testimony, documentary or otherwise, was taken in secret" (p. 302).

The Court of Appeals of the District of Columbia dismissed the petition for lack of jurisdiction to review (p. 298). This Court affirmed the dismissal despite Reaves' contention that he had been deprived of due process of law. We quote a particularly pertinent paragraph from this Court's opinion (p. 306):

> "If it be disputable whether these provisions guarantee to an officer 'the safeguards of a trial in court,' it is certain that the decision is not final with the board but must be reported with the proceedings to the President, and may be approved or disapproved by him. This is the only relief from the errors or the injustice that may be done by the board which is provided. The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency

> of the army. And this was the motive of the act of October 1, 1890, and naturally its accomplishment was intrusted to the President. He executed the trust by constituting examining boards, defining their duty and reserving to himself the ultimate review of their proceedings and decision. This is the protection which the act of Congress gives to the rights conferred by it. If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined."

In *United States ex rel. French* v. *Weeks*, 259 U. S. 326, this Court, citing the *Reaves* case, wrote (p. 335):

> "As a Colonel in the Army, the relator was subject to military law and the principles of that law, as provided by Congress, constituted for him due process of law in a constitutional sense."

The law of the State of New York, as construed by its highest court, is that when an enlisted man applies for a discharge prior to the expiration of his term of enlistment, the ultimate decision as to the propriety of shortening the term and the characterization of the discharge is within the executive discretion of the Governor. The right of an "interview" before a board created to make a recommendation to the Governor is a privilege afforded to the enlisted man. That procedure is, to him, "due process of law in a constitutional sense," and the determination made by the Governor is not subject to judicial review.

The rules governing in the federal military service are comparable. Prior to 1947, Article 108 of the Articles of War (10 U. S. C. A. § 1580) provided that "* * * no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial." As a result of a series of amendments, the former Article 108, renumbered as section 652a of tit. 10, U. S. C. A., now provides that "no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

Conclusion

It is our respectful submission that the petition does not present a federal question, and, in any event, that there is no issue which warrants review by this Court.

The petition for a writ of certiorari should be denied.

Dated, May 9, 1955.

Respectfully submitted,

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